United Nations

A/CN.9/888*

General Assembly

Distr.: General
11 April 2016

Original: English

United Nations Commission on International Trade Law
Forty-ninth session
New York, 27 June-15 July 2016

Online dispute resolution for cross-border electronic commerce transactions

Technical Notes on Online Dispute Resolution

Note by the Secretariat

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* Reissued for technical reasons on 10 May 2016.

V.16-02129 (E) 280416 290416

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission confirmed that the work should include B2B and B2C transactions,[1] and should take account of issues of consumer protection.[2]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission agreed that the Working Group should also consider how the draft rules would respond to the needs of developing countries and those facing post-conflict situations.[3] The Commission also requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[4]

4. At its forty-eighth session (Vienna, 29 June-16 July 2015),[5] the Commission instructed Working Group III to elaborate a non-binding descriptive document reflecting elements of an online dispute resolution process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the online dispute resolution process (arbitration/non-arbitration). It was also agreed that this work should not extend beyond two further Working Group sessions.

5. The Working Group continued its deliberations on a draft text entitled "Technical Notes on Online Dispute Resolution", in accordance with the Commission's instructions, at its thirty-second and thirty-third sessions (Vienna, 30 November-4 December 2015 and New York, 29 February-4 March 2016),[6] and has completed its consideration thereof.

6. This note contains the "Technical Notes on Online Dispute Resolution" which the Working Group submits to the Commission for its consideration and possible adoption (A/CN.9/868, para. 87).

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

[6] A/CN.9/862 and A/CN.9/868.

II. Technical Notes on Online Dispute Resolution

Section I — Introduction

Overview of online dispute resolution

1. In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.

2. One such mechanism is online dispute resolution ("ODR"), which can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others),[7] and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.

Purpose of the Technical Notes

3. The purpose of the Technical Notes is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.

4. The Technical Notes reflect approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.

5. The Technical Notes are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. They do not promote any practice of ODR as best practice.

Non-binding nature of the Technical Notes

6. The Technical Notes are a descriptive document. They are not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding. They do not impose any legal requirement binding on the parties or any persons and/or entities administering or enabling an ODR proceeding, and do not imply any modification to any ODR rules that the parties may have selected.

[7] The order of the list of approaches or forms in brackets is presented in increasing order of formality, reflecting the approach taken in the description of commonly-used, methods for settling disputes contained in UNCITRAL's Legislative Guide on Privately Financed Infrastructure Projects (2000), available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html. Furthermore, the terms are illustrative only, relative formality may vary from system to system, and relevant processes in some jurisdictions may be known by more than one of the terms contained in the list itself.

Section II — Principles

7. The principles that underpin any ODR process include fairness, transparency, due process and accountability.

8. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.

9. ODR ought to be simple, fast and efficient, in order to be able to be used in a "real world setting", including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.

Transparency

10. It is desirable to disclose any relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.

11. The ODR administrator may wish to publish anonymized data or statistics on outcomes in ODR processes, in order to enable parties to assess its overall record, consistent with applicable principles of confidentiality.

12. All relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner.

Independence

13. It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.

14. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.

Expertise

15. The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.

16. An internal oversight/quality assurance process may help the ODR administrator to ensure that a neutral conforms with the standards it has set for itself.

Consent

17. The ODR process should be based on the explicit and informed consent of the parties.

Section III — Stages of an ODR Proceeding

18. The process of an ODR proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.

19. The ODR proceeding may commence when a claimant submits a notice through the ODR platform to the ODR administrator (see section VI below). The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.

20. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, "facilitated settlement" stage (see paras. 40-44 below). In that stage of ODR proceedings, the ODR administrator appoints a neutral (see para. 25 below), who communicates with the parties in an attempt to reach a settlement.

21. If facilitated settlement fails, a third and final stage of ODR proceedings may commence, in which case the ODR administrator or neutral may inform the parties of the nature of such stage.

Section IV — Scope of ODR Process

22. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.

23. An ODR process may apply to disputes arising out of both sales and service contracts.

Section V — ODR Definitions, Roles and Responsibilities, and Communications

24. Online dispute resolution, or "ODR", is a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". The process may be implemented differently by different administrators of the process, and may evolve over time.

25. As used herein a "claimant" is the party initiating ODR proceedings and the "respondent" the party to whom the claimant's notice is directed, in line with traditional, offline, alternative dispute resolution nomenclature. A neutral is an individual that assists the parties in settling or resolving the dispute.

26. ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR proceeding cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral (that is, without an administrator). Instead, to permit the use of technology to enable a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security. Such a system is referred to herein as an "ODR platform".

27. An ODR platform should be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the "ODR

administrator". The ODR administrator may be separate from or part of the ODR platform.

28. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform be specified in the dispute resolution clause.

29. The communications that may take place during the course of proceedings have been defined as "any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means."

30. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated "electronic address". The term "electronic address" is defined in other UNCITRAL texts.

31. To enhance efficiency it is desirable that the ODR administrator promptly:

(a) Acknowledge receipt of any communication by the ODR platform;

(b) Notify parties of the availability of any communication received by the ODR platform; and

(c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.

32. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, it is desirable that the ODR administrator be empowered to extend deadlines, in order to allow for some flexibility when appropriate.

Section VI — Commencement of ODR proceedings

33. In order to commence an ODR proceeding, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:

(a) The name and electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

(b) The name and electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

(c) The grounds on which the claim is made;

(d) Any solutions proposed to resolve the dispute;

(e) The claimant's preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

34. ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the parties that the notice is available at the ODR platform.

35. It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements:

(a) The name and electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

(b) A response to the grounds on which the claim is made;

(c) Any solutions proposed to resolve the dispute;

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative; and

(e) Notice of any counterclaim containing the grounds on which the counterclaim is made.

36. As much as is possible, it is desirable that both the claimant's notice and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.

Section VII — Negotiation

37. The first stage may be a negotiation, conducted between the parties via the ODR platform.

38. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant; or

(b) Failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent.

39. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceed to the next stage.

Section VIII — Facilitated settlement

40. The second stage of ODR proceedings may be facilitated settlement, whereby a neutral is appointed and communicates with the parties to try to achieve a settlement.

41. That stage may commence if negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings.

42. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoint a neutral, and notify the parties of that appointment, and provide certain details about the identity of the neutral.

43. In the facilitated settlement stage, it is desirable that the neutral communicate with the parties to try to achieve a settlement.

44. If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.

Section IX — Final Stage

45. If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take.

Section X — Appointment, powers and functions of the neutral

46. To enhance efficiency and reduce costs, it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process in accordance with any applicable ODR rules. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator "promptly" appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

47. It is desirable that neutrals have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers.

48. With regard to the appointment and functions of neutrals, it is desirable that:

(a) The neutral's acceptance of his or her appointment operates to confirm that he or she has the time necessary to devote to the process;

(b) The neutral be required to declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) The ODR system provides parties with a method for objecting to the appointment of a neutral;

(d) In the event of an objection to an appointment of a neutral, the ODR administrator be required to make a determination as to whether the neutral shall be replaced;

(e) There be only one neutral per dispute appointed at any time for reasons of cost efficiency;

(f) A party be entitled to object to the neutral receiving information generated during the negotiation period; and

(g) If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator be required to appoint a replacement, subject to the same safeguards as set out during the appointment of the initial neutral.

49. In respect of the powers of the neutral, it is desirable that:

(a) Subject to any applicable ODR rules, the neutral be enabled to conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral be required to avoid unnecessary delay or expense in the conduct of the proceedings;

(c) The neutral be required to provide a fair and efficient process for resolving disputes;

(d) The neutral be required to remain independent, impartial and treat both parties equally throughout the proceedings;

(e) The neutral be required to conduct proceedings based on such communications as are before the neutral during the proceedings;

(f) The neutral be enabled to allow the parties to provide additional information in relation to the proceedings; and

(g) The neutral be enabled to extend any deadlines set out in any applicable ODR rules for a reasonable time.

50. While the process for appointment of a neutral for an ODR proceeding is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.

Section XI — Language

51. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, it is desirable that a party to the proceedings be able to indicate in the claimant's notice or response whether it wishes to proceed in a different language, so that the ODR administrator can identify other language options that the parties may select.

Section XII — Governance

52. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.

53. It is desirable that ODR proceedings be subject to the same due process standards that apply to that process in an offline context, in particular independence, neutrality and impartiality.